



Western Australia

# Wills Act 1970



# Wills Act 1970

## Contents

<b>Part I — Preliminary</b>		
1.	Short title	2
2.	Commencement	2
4.	Terms used	2
5.	Application of Act	3
<b>Part II — Dispositions and appointments by will</b>		
6.	Provision that may be made by will	4
7.	Age of capacity to make will	4
<b>Part III — Execution of wills</b>		
8.	Execution generally	5
9.	Execution of will exercising power of appointment	5
10.	Alterations after execution	6
11.	Situation in which person cannot be witness	6
<b>Part V — Revocation of wills</b>		
14.	Subsequent marriage	7
14A.	Ending of marriage	7
15.	When will revoked	8
16.	How revoked will revived	9
<b>Part VI — Privileged wills</b>		
17.	Saving for wills and revocations made under former provisions	10

**Part VII — Rules as to formal  
validity of wills**

- |     |   |    |
|-----|---|----|
| 20. | General rules as to formal validity     | 11 |
| 21. | Ascertainment of system of internal law | 12 |

**Part VIII — The construction of wills**

- |      |   |    |
|------|---|----|
| 24.  | Change of domicile  | 13 |
| 25.  | Disposition of interest in property after making<br>of will         | 13 |
| 26.  | General rules of construction                                       | 13 |
| 27.  | Statutory substitutional gift                                       | 14 |
| 28.  | Charges on property to be paid primarily out of<br>property charged | 15 |
| 28A. | Use of extrinsic evidence to clarify will                           | 16 |

**Part IX — Illegitimacy**

- |     |   |    |
|-----|---|----|
| 29. | Application of Part IX                                    | 17 |
| 30. | Abolition of rule regarding illegitimates not in<br>being | 17 |
| 31. | Determination of relationships                            | 17 |

**Part XA — International wills**

- |      |   |    |
|------|---|----|
| 32A. | Terms used  | 19 |
| 32B. | Application of Convention   | 19 |
| 32C. | Persons authorised to act in connection with<br>international wills | 19 |
| 32D. | Witnesses to international wills                                    | 20 |
| 32E. | Application of Act to international wills                           | 20 |

**Part X — Informal wills**

- |     |  |    |
|-----|--|----|
| 32. | Court may dispense with formal requirements                | 21 |
| 33. | Application of section 32                                  | 22 |
| 38. | Modification of certain references to execution of<br>will | 22 |

## **Part XI — Wills of persons who lack testamentary capacity**

### **Division 1 — Jurisdiction of Supreme Court to authorise the making, alteration and revocation of wills**

39.	Terms used	23
40.	Jurisdiction of Court to make, alter or revoke will	23
41.	Content of application under section 40	24
42.	Certain criteria to be applied by Court	26
43.	Further powers of Court	26
44.	Deposit of wills made under this Part with Principal Registrar	27
45.	Court may allow access to will	28
46.	Alteration or revocation of will authorised under this Part	28
47.	Protection of privacy of persons to whom applications relate	29

### **Division 2 — Wills of persons who lack testamentary capacity made under the law of another place**

48.	Recognition of wills	29
-----	----------------------	----

## **Part XII — Rectification of wills by Supreme Court**

49.	Term used: Court	31
50.	Court may rectify will	31

## **Schedule 1 — Annex to Convention providing a Uniform Law on the Form of an International Will 1973**

### **ANNEX**

#### **UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL**

#### **Article 1**

#### **Article 2**

**Article 3**

**Article 4**

**Article 5**

**Article 6**

**Article 7**

**Article 8**

**Article 9**

**Article 10**

**CERTIFICATE**

**Article 11**

**Article 12**

**Article 13**

**Article 14**

**Article 15**

**Notes**

Compilation table

37

Other notes

38

**Defined terms**

Western Australia

## **Wills Act 1970**

**An Act to consolidate and amend the law relating to wills.**

## **Part I — Preliminary**

**1. Short title**

This Act may be cited as the *Wills Act 1970*.

**2. Commencement**

This Act shall come into operation on a date to be fixed by proclamation.

[3. *Omitted under the Reprints Act 1984 s. 7(4)(f).*]

**4. Terms used**

In this Act, unless the contrary intention appears —

**country** means any place or group of places having its own law of nationality, including the Commonwealth and its territories;

**disposition** includes a gift, devise, bequest or an appointment of property contained in a will; and

**dispose of** has a corresponding meaning;

**internal law** in relation to any country or place means the law that would apply in a case where no question of the law in force in any other country or place arose;

**marriage** has the meaning given to that term in the *Marriage Act 1961* of the Commonwealth;

**place** means any territory including a State or Territory of the Commonwealth;

**property** includes real and personal property or any interest therein and any thing or chose in action;

**will** includes a codicil and any testamentary instrument or disposition.

[*Section 4 amended: No. 27 of 2007 s. 4.*]



**5. Application of Act**

This Act applies to the will of any person dying on or after the date of the coming into operation of this Act, whether the will was executed or made before, on or after that date but does not apply to the will of any person who died before that date.

## **Part II — Dispositions and appointments by will**

### **6. Provision that may be made by will**

A person may, by a will executed or made in a manner required or permitted by this Act —

- (a) dispose of property (whether acquired before or after the making of the will) to which at the time of the person's death the person is entitled either at law or in equity; and
- (b) dispose of property that in exercise of a power of appointment the person is entitled or able to dispose of by will; and
- (c) appoint a guardian of any infant child of the person.

*[Section 6 inserted: No. 27 of 2007 s. 5.]*

### **7. Age of capacity to make will**

Subject to section 17, a will made by a person under the age of 18 years is not valid.

*[Section 7 amended: No. 27 of 2007 s. 6.]*

---

## Part III — Execution of wills

### 8. Execution generally

Subject to sections 17 and 20 and Parts XA, X and XI, a will is not valid unless —

- (a) it is in writing; and
- (b) it is signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction, in such place on the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as the testator's will; and
- (c) the testator makes or acknowledges the signature in the presence of at least 2 witnesses present at the same time; and
- (d) the witnesses attest and subscribe the will in the presence of the testator but no publication or form of attestation is necessary.

*[Section 8 amended: No. 69 of 1987 s. 4; No. 27 of 2007 s. 7; No. 47 of 2012 s. 4.]*

### 9. Execution of will exercising power of appointment

- (1) If a power is conferred on a person to make an appointment by a will which power is to be executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in a manner required or permitted by this Act, but is not executed in that particular manner or with that particular solemnity.
- (2) For the purposes of subsection (1), a document that is a will by operation of Part X is deemed to be executed in the manner required by section 8.

*[Section 9 amended: No. 69 of 1987 s. 5; No. 27 of 2007 s. 8.]*

**s. 10**

---

**10. Alterations after execution**

- (1) In subsection (3) —  
*apparent* means legible by the unaided eye or with the help of a magnifying lens but not otherwise.
- (2) Subject to Part X, an alteration to a will after it has been executed is not effective unless the alteration is executed in a manner in which a will is required or permitted to be executed by this Act.
- (3) Subsection (2) does not apply to an alteration to a will made by, or at the direction of, the testator if the words or effect of the will are no longer apparent because of the alteration.
- (4) If a will is altered, it is sufficient compliance with the requirements for execution if the signatures of the testator and of the witnesses to the alteration, or in the case of a will referred to in section 17 the signature of the testator, are or is made —
- (a) in the margin, or on some other part of the will beside, near or otherwise relating to the alteration; or
  - (b) as authentication of a memorandum referring to the alteration and written on the will.

*[Section 10 inserted: No. 27 of 2007 s. 9.]*

**11. Situation in which person cannot be witness**

A person who is unable to see and attest that a testator has signed a document cannot act as a witness to a will.

*[Section 11 inserted: No. 27 of 2007 s. 10.]*

*[Part IV: s. 12 deleted: No. 27 of 2007 s. 11;  
s. 13 deleted: No. 28 of 2003 s. 211(1)<sup>1</sup>.]*

---

## Part V — Revocation of wills

### 14. Subsequent marriage

- (1) A will is revoked by the marriage of the testator except where —
  - (a) it is made in contemplation of the marriage; or
  - (b) the will is made in exercise of a power of appointment where the property thereby appointed would not in default of appointment pass to the testator's personal representatives as such.
- (2) A will made in contemplation of the marriage of the testator is void if the marriage is not solemnised, unless the will provides to the contrary.
- (3) For the purposes of this section, a will is made in contemplation of a marriage if —
  - (a) it is expressed to be made in contemplation of the marriage; or
  - (b) there is other evidence establishing that the will was made in contemplation of the marriage.
- (4) Subsection (3)(b) applies to the will of a person dying on or after the day on which section 12 of the *Wills Amendment Act 2007* comes into operation, whether the will was executed or made before, on or after that day, and the will of a person who died before that day is to be construed as if that section had not come into operation.

*[Section 14 amended: No. 27 of 2007 s. 12.]*

### 14A. Ending of marriage

- (1) In this section —  
***Family Court of Australia*** means the Family Court of Australia created by the Family Law Act;

**Family Law Act** means the *Family Law Act 1975* of the Commonwealth.

- (2) A will is revoked by the ending of the testator's marriage except where —
- (a) a contrary intention appears in the will; or
  - (b) there is other evidence establishing such an intention.
- (3) For the purposes of subsection (2), a marriage ends —
- (a) when a divorce order terminating the marriage takes effect under the Family Law Act; or
  - (b) on the granting of a decree of nullity in respect of the marriage by the Family Court of Australia or the Family Court of Western Australia; or
  - (c) on the dissolution or annulment of the marriage in accordance with the law of a place outside Australia, but only if that dissolution or annulment is recognised in Australia under the Family Law Act.
- (4) Subsection (2) —
- (a) applies where a marriage ends on or after the day on which section 13 of the *Wills Amendment Act 2007* comes into operation, whether the will was executed or made before, on or after that day; and
  - (b) does not apply where a marriage ends before that day.

*[Section 14A inserted: No. 27 of 2007 s. 13.]*

## **15. When will revoked**

Without limiting sections 14(1) and 14A(2), the whole or any part of a will may be revoked only —

- (a) by a later will, including a document that is a will by operation of Part X; or
- (b) subject to Part X, by some writing declaring an intention to revoke it, executed in the manner in which a will is required or permitted to be executed by this Act; or

- (c) by the testator, or some person in the testator's presence and by the testator's direction, burning, tearing or otherwise destroying it to give effect to the intention of the testator of revoking it.

*[Section 15 inserted: No. 27 of 2007 s. 14.]*

**16. How revoked will revived**

- (1) Subject to Part X, a will or any part of a will that has been revoked is revived only by the re-execution of that will or by execution of a later will, including a document that is a will by operation of Part X, showing an intention to revive that will or part.
- (2) When a will that has been partly revoked and afterwards wholly revoked is revived, the revival does not, unless the contrary intention appears by the will, extend to the part that was revoked before the revocation of the whole.
- (3) A will that has been revoked and later revived, either wholly or partly, is taken to have been executed on the day on which the will is revived.

*[Section 16 amended: No. 69 of 1987 s. 8; No. 27 of 2007 s. 15.]*

## **Part VI — Privileged wills**

### **17. Saving for wills and revocations made under former provisions**

- (1) The repeal of sections 17, 18 and 19 of this Act by section 16 of the *Wills Amendment Act 2007* (the **repeal**) does not affect —
  - (a) a will made under section 18 before the repeal; or
  - (b) the revocation of such a will under section 19 before the repeal.
- (2) A will referred to in subsection (1)(a), or part of such a will, that was not revoked before the repeal has effect as if the repeal had not occurred, but may only be revoked after the repeal in accordance with section 15.

*[Section 17 inserted: No. 27 of 2007 s. 16.]*

*[18, 19. Deleted: No. 27 of 2007 s. 16.]*



## Part VII — Rules as to formal validity of wills

### 20. General rules as to formal validity

- (1) A will is taken to be properly executed if its execution conforms to the internal law in force in the place —
  - (a) where it was executed; or
  - (b) that was the testator's domicile or habitual residence, either at the time the will was executed, or at the testator's death; or
  - (c) of which the testator was a national, either at the date of execution of the will, or at the testator's death.
- (2) The following wills are also taken to be properly executed —
  - (a) a will executed on board a vessel or aircraft, if the will has been executed in conformity with the internal law in force in the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances;
  - (b) a will, so far as it disposes of immovable property, if it has been executed in conformity with the internal law in force in the place where the property is situated;
  - (c) a will, so far as it revokes a will or a provision of a will that has been executed in accordance with this Act, or that is taken to have been properly executed by this Act, if the later will has been executed in conformity with any law by which the earlier will or provision would be taken to have been validly executed;
  - (d) a will, so far as it exercises a power of appointment, if the will has been executed in conformity with the law governing the essential validity of the power.

*[Section 20 inserted: No. 27 of 2007 s. 17.]*

**s. 21**

---

**21. Ascertainment of system of internal law**

- (1) If the internal law in force in a place is to be applied to a will, but there is more than one system of internal law in force in the place that relates to the formal validity of wills, the system to be applied is determined as follows —
  - (a) if there is a rule in force throughout the place that indicates which system of internal law applies to the will, that rule must be followed;
  - (b) if there is no rule, the system of internal law is that with which the testator was most closely connected either —
    - (i) at the time of the testator's death, if the matter is to be determined by reference to circumstances prevailing at the testator's death; or
    - (ii) in any other case, at the time of execution of the will.
- (2) In determining whether a will has been executed in conformity with a particular internal law, regard must be had to the formal requirements of that law at the time of execution, but account may be taken of a later alteration of the law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.
- (3) If a law in force outside this State is applied to a will, a requirement of that law that special formalities must be observed by testators of a particular description or that the witnesses to the execution of a will must have certain qualifications, is to be taken to be a formal requirement only, despite any rule of that law to the contrary.

*[Section 21 inserted: No. 27 of 2007 s. 17.]*

*[22, 23. Deleted: No. 27 of 2007 s. 17.]*

## Part VIII — The construction of wills

### 24. Change of domicile

The construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will.

### 25. Disposition of interest in property after making of will

If —

- (a) a testator has made a will disposing of property; and
- (b) after the making of the will and before the testator's death, the testator disposes of an interest in that property,

the will operates to dispose of any remaining interest the testator has in that property.

*[Section 25 inserted: No. 27 of 2007 s. 18.]*

### 26. General rules of construction

- (1) Unless the contrary intention appears by the will —
  - (a) the will is to be construed, with reference to the property comprised in it, to speak and take effect as if it has been executed immediately before the death of the testator;
  - (b) property that is the subject of a disposition, other than the exercise of a power of appointment, that is void or fails to take effect is to be included in any residuary disposition contained in the will;
  - (c) a general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land;
  - (d) a general disposition of all the testator's property or of all the testator's property of a particular kind includes property over which the testator had a general power of appointment exercisable by will and operates as an execution of the power;

**s. 27**

---

- (e) a disposition of property without words of limitation whether to a person beneficially or as executor or trustee is to be construed as passing the whole estate or interest of the testator therein;
  - (f) a disposition of the residue of the estate of a testator, or of the whole of the estate of a testator, that refers only to —
    - (i) the real estate of the testator; or
    - (ii) the personal estate of the testator,is to be construed to include both the real and personal estate of the testator;
  - (g) if any part of a disposition in fractional parts of the whole or of the residue of the estate of a testator fails, the part that fails accrues to the part that does not fail, and, if there is more than one part that does not fail, to all those parts proportionately.
- (2) Subsection (1)(f) and (g) apply to the will of a person dying on or after the day on which section 19(1)(e) of the *Wills Amendment Act 2007* comes into operation, whether the will was executed or made before, on or after that day, and the will of a person who died before that day is to be construed as if section 19(1)(e) of that Act had not come into operation.

*[Section 26 amended: No. 27 of 2007 s. 19.]*

**27. Statutory substitutional gift**

- (1) Unless the contrary intention appears by the will, where —
- (a) there is a disposition in a will to a person who is a child or other issue of the testator, for an estate or interest not determinable at or before the death of that person; and
  - (b) that person dies in the lifetime of the testator leaving a child or children who survive the testator,
- the disposition does not lapse but takes effect as a substitutional disposition to such of the children of that person as survive the testator and if more than one in equal shares.

- (2) This section applies whether the disposition referred to in subsection (1) is to a person as a named or designated person or as a member of a class.
- (3) This section does not apply to a disposition to a person as one of 2 or more joint tenants.

*[Section 27 amended: No. 27 of 2007 s. 20.]*

**28. Charges on property to be paid primarily out of property charged**

- (1) Where by will a testator disposes of any property that at the time of the testator's death is charged with the payment of money whether by way of mortgage, charge, lien (including a lien for unpaid purchase money) or otherwise and the testator has not by the will or by a deed or other document signified a contrary or other intention the property so charged is, as between the different persons claiming through the testator, primarily liable for payment of the money secured by the charge, and every part of such property according to its value shall bear a proportionate part of the charge on the whole.
- (2) Such contrary or other intention is not deemed to be signified —
  - (a) by a general direction for the payment of the debts, or of all the debts of the testator out of the testator's personal estate, or out of the testator's residuary real and personal estate, or out of the testator's residuary real estate; or
  - (b) by a charge of debts on any such estates, unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.
- (3) Nothing in this section affects the right of the person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the testator's estate or otherwise.

*[Section 28 amended: No. 27 of 2007 s. 21.]*

**s. 28A**

---

**28A. Use of extrinsic evidence to clarify will**

- (1) In proceedings to construe a will, evidence, including evidence of the testator's intention, is admissible to the extent that the language used in, or other content of, the will renders the will or any part of the will —
  - (a) meaningless; or
  - (b) ambiguous on the face of the will; or
  - (c) ambiguous in the light of the surrounding circumstances.
- (2) Evidence of a testator's intention is not admissible to establish any of the circumstances referred to in subsection (1)(c).
- (3) Nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.
- (4) This section applies to the will of any person dying on or after the day on which section 22 of the *Wills Amendment Act 2007* comes into operation, whether the will was made or executed before, on or after that day, but does not apply to the will of a person who died before that day.

*[Section 28A inserted: No. 27 of 2007 s. 22.]*

## Part IX — Illegitimacy

*[Heading inserted: No. 20 of 1971 s. 3.]*

### 29. Application of Part IX

The provisions of this Part<sup>2</sup> apply to the will of any person which is executed on or after the date of the coming into operation of the *Wills Act Amendment Act 1971*, but does not apply to the will of any person which was executed before that date and, notwithstanding any rule of law, a disposition made by a will executed before that date shall not be treated for the purposes of this Part as made on or after that date by reason only that a codicil to the will is executed on or after that date.

*[Section 29 inserted: No. 20 of 1971 s. 3.]*

### 30. Abolition of rule regarding illegitimates not in being

As respects any will to which this Part applies, any rule of law that a disposition in favour of illegitimate children not in being when the disposition takes effect is void as contrary to public policy is hereby abolished.

*[Section 30 inserted: No. 20 of 1971 s. 3.]*

### 31. Determination of relationships

- (1) Unless the contrary intention appears by the will, where for the purpose of determining who is entitled to an interest in any property that is the subject of a disposition (whether that disposition is effected under that will or under the provisions of section 27) it is necessary to determine any relationship, the relationship between a child and his or her parents shall be determined irrespective of whether the parents are or have been married to each other, and all other relationships, whether lineal or collateral, shall be construed accordingly.

**s. 31**

---

- (2) In any proceedings where a person relies on a matter of fact made relevant by the provisions of subsection (1) —
- (a) that fact shall not be taken to be proved unless it is established to the reasonable satisfaction of the Court; and
  - (b) where the parents are not, or have not been, married to each other, the relationship between a child and his or her parent, and all other lineal or collateral relationships, shall be recognised only —
    - (i) if parentage is admitted by or established against the parent in his or her lifetime; and
    - (ii) where the purpose for which the relationship is to be determined enures for the benefit of the parent, if parentage has been so admitted or established in the lifetime of the child.

- (3) Subsection (2)(b) does not apply to or in respect of a relationship established by the *Artificial Conception Act 1985*.

*[Section 31 inserted: No. 20 of 1971 s. 3; amended: No. 14 of 1985 s. 8; No. 28 of 2003 s. 212.]*



## Part XA — International wills

[Heading inserted: No. 47 of 2012 s. 5.]

### 32A. Terms used

In this Part —

**Convention** means the *Convention providing a Uniform Law on the Form of an International Will 1973* signed in Washington, D.C. on 26 October 1973;

**international will** means a will made in accordance with the requirements of the Annex to the Convention as set out in Schedule 1;

**this jurisdiction** means Western Australia.

[Section 32A inserted: No. 47 of 2012 s. 5; amended: No. 9 of 2022 s. 424.]

### 32B. Application of Convention

The Annex to the Convention has the force of law in this jurisdiction.

Note for this section:

The Annex to the Convention is set out in Schedule 1.

[Section 32B inserted: No. 47 of 2012 s. 5.]

### 32C. Persons authorised to act in connection with international wills

- (1) For the purposes of this Part, the following persons are authorised to act in connection with an international will —
  - (a) a legal practitioner;
  - (b) a public notary of any Australian jurisdiction.
- (2) For the purposes of this Part, a reference in the Annex to the Convention to a person authorised to act in connection with international wills is a reference to —
  - (a) a person referred to in subsection (1) who is acting in Australia; or

**s. 32D**

---

- (b) any other person who is acting as an authorised person under the law of a state (other than Australia) that is a party to the Convention.

Note for this section:

This section gives effect to Articles II and III of the Convention.

*[Section 32C inserted: No. 47 of 2012 s. 5; amended: No. 9 of 2022 s. 424.]*

**32D. Witnesses to international wills**

The conditions requisite to acting as a witness to an international will are governed by the law of this jurisdiction.

Note for this section:

See section 11.

*[Section 32D inserted: No. 47 of 2012 s. 5.]*

**32E. Application of Act to international wills**

To avoid doubt, the provisions of this Act that apply to wills extend to international wills.

*[Section 32E inserted: No. 47 of 2012 s. 5.]*

## Part X — Informal wills

*[Heading inserted: No. 69 of 1987 s. 9.]*

### 32. Court may dispense with formal requirements

(1) In this section and section 33 —

**document** means any record of information including —

- (a) anything on which there is writing; or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph,

and includes any part of a document within the meaning given by this subsection.

(2) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in the manner required by this Act, constitutes —

- (a) a will of the person; or
- (b) an alteration to a will of the person; or
- (c) the revocation of a will of the person; or
- (d) the revival of a will or part of a will of the person,

if the Supreme Court is satisfied that the person intended the document to constitute the person's will, an alteration to the person's will, the revocation of the person's will or the revival of a will or part of a will of the person, as the case may be.

(3) In forming its view, the Supreme Court may have regard (in addition to the document) to any evidence relating to the manner of execution or testamentary intentions of the person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the person.

**s. 33**

---

- (4) This section applies to a document whether it came into existence within or outside the State.

*[Section 32 inserted: No. 27 of 2007 s. 23.]*

**33. Application of section 32**

- (1) Section 32 applies only to persons dying on or after the day on which section 23 of the *Wills Amendment Act 2007* comes into operation, but in respect of persons so dying extends to any document that came into existence before that day.
- (2) For persons dying before the day referred to in subsection (1), this Part has effect as if section 23 of the *Wills Amendment Act 2007* had not come into operation.

*[Section 33 inserted: No. 27 of 2007 s. 23.]*

*[34-37. Deleted: No. 27 of 2007 s. 23.]*

**38. Modification of certain references to execution of will**

For the purposes of sections 24, 26(a) and 29 a document that is a will by operation of this Part is executed, notwithstanding the absence of a signature to, or other form of execution of, the document.

*[Section 38 inserted: No. 69 of 1987 s. 9.]*

## **Part XI — Wills of persons who lack testamentary capacity**

*[Heading inserted: No. 27 of 2007 s. 24.]*

### **Division 1 — Jurisdiction of Supreme Court to authorise the making, alteration and revocation of wills**

*[Heading inserted: No. 27 of 2007 s. 24.]*

#### **39. Terms used**

(1) In this Part —

***Court*** means the Supreme Court;

***person concerned*** has the meaning given by section 40(1);

***Principal Registrar*** means the person for the time being holding or acting in the office designated under the *Supreme Court Act 1935* as the “Principal Registrar of the Supreme Court”.

(2) For the purposes of sections 6, 9(1), 10(2) and 15(b), a will or instrument signed in accordance with section 40(4) is to be taken to be executed by the person concerned in a manner permitted by this Act.

*[Section 39 inserted: No. 27 of 2007 s. 24.]*

#### **40. Jurisdiction of Court to make, alter or revoke will**

(1) The Court may, on application made by any person, make an order authorising —

(a) the making or alteration of a will in specific terms approved by the Court; or

(b) the revocation of the whole or any part of a will,

on behalf of a person who lacks testamentary capacity (the ***person concerned***).

**Wills Act 1970**

**Part XI** Wills of persons who lack testamentary capacity

**Division 1** Jurisdiction of Supreme Court to authorise the making, alteration and revocation of wills

**s. 41**

---

- (2) The Court is not to make an order under subsection (1) unless, at the time when the order is made, the person concerned —
  - (a) is living; and
  - (b) has reached the age of 18 years.
- (3) An order under subsection (1) may authorise —
  - (a) the making or alteration of a will that deals with the whole, or with only part, of the property of the person concerned; or
  - (b) the alteration of only part of the person's will.
- (4) A will or instrument authorised under subsection (1) must be signed by the Principal Registrar and sealed with the seal of the Court.

*[Section 40 inserted: No. 27 of 2007 s. 24.]*

**41. Content of application under section 40**

- (1) In an application under section 40, the applicant must furnish the following to the Court, except to the extent that the Court otherwise allows —
  - (a) a written statement of the nature of the application and the reasons for it;
  - (b) an estimate of the nature and value of the assets of the person concerned and of the nature and amount of the person's liabilities, so far as that information is known to the applicant;
  - (c) a suggested draft of the proposed will or alteration or of the instrument of revocation;
  - (d) any evidence available to the applicant as to the wishes of the person concerned;
  - (e) evidence as to the likelihood of the person concerned having testamentary capacity at a later time;
  - (f) any will, or a copy of any will, of the person concerned in the possession of the applicant, or details known to the applicant of the contents of any will of the person

concerned, and evidence that the applicant has made reasonable enquiry to locate such wills, or details of the contents of such wills, as may have been made by the person concerned;

- (g) evidence that the applicant has made reasonable enquiry concerning the interests of any person who would be entitled to receive any part of the estate of the person concerned either under a previous will or if the person were to die intestate, and any evidence of those interests so far as they are known to the applicant;
  - (h) evidence that the applicant has made reasonable enquiry concerning the likelihood of an application being made under the *Family Provision Act 1972*, and evidence of any facts known to the applicant indicating such a likelihood;
  - (i) evidence that the applicant has made reasonable enquiry concerning the circumstances of any person for whom the person concerned might reasonably be expected to make provision under a will, and any evidence of those circumstances so far as they are known to the applicant;
  - (j) a reference to any gift to a body, whether charitable or not, or for a charitable purpose, that the person concerned might reasonably be expected to make by will;
  - (k) evidence of any other facts that the applicant considers to be relevant to the application.
- (2) In subsection (1) —

**previous will**, in paragraph (g), means a will made before a will furnished to the Court, or details of which are furnished to the Court, in accordance with paragraph (f);

**will**, in paragraphs (f) and (g), includes a document that is a will by operation of Part X.

*[Section 41 inserted: No. 27 of 2007 s. 24; amended: No. 48 of 2011 s. 17.]*

**42. Certain criteria to be applied by Court**

- (1) In exercising its powers under section 40 the Court must refuse an application if it is not satisfied that —
  - (a) the person concerned is incapable of making a valid will or of altering or revoking the person's will, as the case may be; and
  - (b) the suggested will, alteration or revocation, or that will, alteration or revocation as revised under section 43(1)(b), is one which could be made by the person concerned if the person were not lacking testamentary capacity; and
  - (c) the applicant is an appropriate person to make the application; and
  - (d) adequate steps have been taken to allow all persons with a legitimate interest in the application, including persons who have reason to expect any benefit from the estate of the person concerned, to be represented in the proceedings.
- (2) Subsection (1) does not prevent the Court from refusing an application for any other reason.

*[Section 42 inserted: No. 27 of 2007 s. 24.]*

**43. Further powers of Court**

- (1) In proceedings under section 40 the Court may —
  - (a) give directions, including directions about the attendance of any person as a witness and, if it thinks fit, the attendance of the person concerned; and
  - (b) revise the terms of the suggested draft of the proposed will, alteration or revocation furnished to the Court under section 41(1)(c); and
  - (c) inform itself as to any matter in any manner it thinks fit; and



- (d) make any order it thinks fit as to the costs of and incidental to the proceedings.
- (2) The Court is not bound by the rules of evidence in proceedings under section 40.

*[Section 43 inserted: No. 27 of 2007 s. 24.]*

**44. Deposit of wills made under this Part with Principal Registrar**

- (1) After a will or instrument has been signed by the Principal Registrar under section 40(4) —
  - (a) it must be deposited in the office of the Principal Registrar; and
  - (b) the fee prescribed under section 171(1)(c) of the *Supreme Court Act 1935* must be paid by the person who made the relevant application under section 40.
- (2) A will or instrument deposited in the office of the Principal Registrar under subsection (1) must be in a sealed envelope that has written on it —
  - (a) the name and address of the person concerned, as they appear in the will or instrument; and
  - (b) the name and address of any executor as they appear in the will or instrument; and
  - (c) the date of the will or instrument.
- (3) If the Court has made an order authorising the revocation of a will deposited under subsection (1), the Principal Registrar must release the will to the person who made the relevant application under section 40.
- (4) If the person concerned has acquired or regained testamentary capacity to the satisfaction of the Court, the Principal Registrar must release to that person a will deposited under subsection (1).

*[Section 44 inserted: No. 27 of 2007 s. 24.]*

**45. Court may allow access to will**

- (1) A person may, with the leave of the Court and in accordance with the terms of the leave, request the Principal Registrar to provide the person with a copy of a will deposited in the office of the Principal Registrar under section 44, and the Principal Registrar must comply with a request so made.
- (2) The Court may, on the application of any person, grant leave to the person for the purposes of subsection (1) on such terms as it thinks fit, but only if —
  - (a) the Court is satisfied that adequate steps have been taken to allow all persons with a legitimate interest in the application to be represented in the proceedings; and
  - (b) it appears to the Court to be necessary or desirable for the proper carrying out of the provisions of the will that leave be granted.

*[Section 45 inserted: No. 27 of 2007 s. 24.]*

**46. Alteration or revocation of will authorised under this Part**

- (1) This section applies if —
  - (a) a will has been made on behalf of a person under this Part; and
  - (b) the person acquires or regains testamentary capacity.
- (2) The will —
  - (a) may be altered by the person in accordance with section 10 or by a document that has effect under Part X; and
  - (b) may be revoked in whole or in part by the person in accordance with section 15 or by a document that has effect under Part X; and
  - (c) is subject to revocation under section 14(1) or 14A(2),as if it were a will executed in accordance with section 8.

*[Section 46 inserted: No. 27 of 2007 s. 24.]*

**47. Protection of privacy of persons to whom applications relate**

- (1) In proceedings under section 40, the Court may do any or all of the following, either on its own initiative or on the application of a party to the proceedings —
- (a) order that the whole or any part of the proceedings be heard in closed court;
  - (b) order that only persons or classes of persons specified by the Court may be present during the whole or any part of the proceedings;
  - (c) make an order prohibiting the publication of a report of —
    - (i) the whole or any part of the proceedings; or
    - (ii) any information derived from or relating to the proceedings,including any order made by the Court.
- (2) Instead of making an order described in subsection (1)(c), the Court may make such an order but with exceptions allowing the publication, in the manner or to the persons specified in the order, of particulars or information, or particulars or information of a kind, so specified.

*[Section 47 inserted: No. 27 of 2007 s. 24.]*

**Division 2 — Wills of persons who lack testamentary capacity  
made under the law of another place**

*[Heading inserted: No. 27 of 2007 s. 24.]*

**48. Recognition of wills**

- (1) In this section —
- statutory will** means a will executed by virtue of a statutory provision on behalf of a person who, at the time of execution, lacked testamentary capacity, and includes an alteration to and a revocation of a statutory or other will.

**Wills Act 1970**

**Part XI** Wills of persons who lack testamentary capacity

**Division 2** Wills of persons who lack testamentary capacity made under the law of another place

**s. 48**

---

- (2) A statutory will made according to the law of the place where the deceased was resident at the time of execution is to be regarded as a valid will of the deceased or a valid alteration or revocation of a will, as the case may be, for the purposes of the law of this State.
- (3) The application of subsection (2) extends to a statutory will made before the commencement of section 24 of the *Wills Amendment Act 2007*.

*[Section 48 inserted: No. 27 of 2007 s. 24.]*

## **Part XII — Rectification of wills by Supreme Court**

*[Heading inserted: No. 27 of 2007 s. 24.]*

### **49. Term used: Court**

In this Part —

**Court** means the Supreme Court.

*[Section 49 inserted: No. 27 of 2007 s. 24.]*

### **50. Court may rectify will**

- (1) The Court may make an order rectifying a will to carry out the intentions of a deceased testator if the Court is satisfied that the will does not carry out the testator's intentions because —
  - (a) a clerical error was made; or
  - (b) the will does not give effect to the testator's instructions.
- (2) Any application for an order under this section must be made within 6 months after the death of the testator.
- (3) The Court may extend the period of time for making an application, even if the original period has expired, but not if the final distribution of the estate has been made.
- (4) A certified copy of an order under this section must be attached to the original will and to the probated copy of the will.
- (5) Subject to subsection (2), the power conferred by subsection (1) extends to the will of a person who died before the commencement of section 24 of the *Wills Amendment Act 2007*.

*[Section 50 inserted: No. 27 of 2007 s. 24.]*

**Schedule 1 — Annex to Convention providing a Uniform Law on the Form of an International Will 1973**

[s. 32A]

*[Heading inserted: No. 47 of 2012 s. 6.]*

**ANNEX**

**UNIFORM LAW ON THE FORM OF AN  
INTERNATIONAL WILL**

**Article 1**

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.
2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

**Article 2**

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

**Article 3**

1. The will shall be made in writing.
2. It need not be written by the testator himself.
3. It may be written in any language, by hand or by any other means.

**Article 4**

1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.

2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

#### **Article 5**

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.
2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.
3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

#### **Article 6**

1. The signatures shall be placed at the end of the will.
2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

#### **Article 7**

1. The date of the will shall be the date of its signature by the authorized person.
2. This date shall be noted at the end of the will by the authorized person.

#### **Article 8**

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to

have his will kept shall be mentioned in the certificate provided for in Article 9.

**Article 9**

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

**Article 10**

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

**CERTIFICATE**

(Convention of October 26, 1973)

1. I, ..... (name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on ..... (date) at ..... (place)
3. (testator) ..... (name, address, date and place of birth) in my presence and that of the witnesses
- 4.(a) ..... (name, address, date and place of birth)
- (b) ..... (name, address, date and place of birth)

has declared that the attached document is his will and that he knows the contents thereof.

5. I furthermore certify that:
- 6.(a) in my presence and in that of the witnesses
- (1) the testator has signed the will or has acknowledged his signature previously affixed.



- \**(2)* following a declaration of the testator stating that he was unable to sign his will for the following reason .....
  - I have mentioned this declaration on the will
  - \* — the signature has been affixed by ..... (name, address)
- 7.*(b)* the witnesses and I have signed the will;
- 8.\**(c)* each page of the will has been signed by ..... and numbered;
- 9.*(d)* I have satisfied myself as to the identity of the testator and of the witnesses as designated above;
- 10.*(e)* the witnesses met the conditions requisite to act as such according to the law under which I am acting;
- 11.\**(f)* the testator has requested me to include the following statement concerning the safekeeping of his will .....
  - 12. PLACE
  - 13. DATE
  - 14. SIGNATURE and, if necessary, SEAL

**Article 11**

The authorized person shall keep a copy of the certificate and deliver another to the testator.

**Article 12**

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

**Article 13**

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

**Article 14**

The international will shall be subject to the ordinary rules of revocation of wills.

**Article 15**

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity of interpretation.

.....  
\*To be completed if appropriate

*[Schedule 1 inserted: No. 47 of 2012 s. 6.]*



## Notes

This is a compilation of the *Wills Act 1970* and includes amendments made by other written laws. For provisions that have come into operation, and for information about any reprints, see the compilation table.

### Compilation table

Short title	Number and year	Assent	Commencement
Wills Act 1970	12 of 1970	29 Apr 1970	1 Jul 1970 (see s. 2 and Gazette 5 Jun 1970 p. 1521)
Wills Act Amendment Act 1971	20 of 1971	1 Dec 1971	21 Jan 1972 (see s. 2 and Gazette 21 Jan 1972 p. 71-2)
<b>Reprint of the Wills Act 1970 approved 28 Feb 1978</b> (includes amendments listed above)			
<i>Artificial Conception Act 1985 s. 8</i>	14 of 1985	12 Apr 1985	1 Jul 1985 (see s. 2 and Gazette 28 Jun 1985 p. 2291)
<i>Wills Amendment Act 1987</i>	69 of 1987	22 Nov 1987	22 Nov 1987 (see s. 2)
<i>Wills Amendment Act 1989</i>	17 of 1989	1 Dec 1989	s. 1 and 2: 1 Dec 1989; Act other than s. 1 and 2: 26 Jan 1990 (see s. 2 and Gazette 26 Jan 1990 p. 656)
<b>Reprint of the Wills Act 1970 as at 11 Sep 1996</b> (includes amendments listed above)			
<i>Wills Amendment Act 1997</i>	47 of 1997	10 Dec 1997	10 Dec 1997 (see s. 2)
<i>Acts Amendment (Equality of Status) Act 2003 Pt. 62<sup>1</sup></i>	28 of 2003	22 May 2003	1 Jul 2003 (see s. 2 and Gazette 30 Jun 2003 p. 2579)
<b>Reprint 3: The Wills Act 1970 as at 17 Oct 2003</b> (includes amendments listed above)			
<i>Wills Amendment Act 2007 s. 3-24</i>	27 of 2007	26 Oct 2007	9 Feb 2008 (see s. 2 and Gazette 8 Feb 2008 p. 313)
<b>Reprint 4: The Wills Act 1970 as at 3 Jul 2009</b> (includes amendments listed above)			
<i>Inheritance (Family and Dependants Provision) Amendment Act 2011 s. 17</i>	48 of 2011	25 Oct 2011	16 Jan 2013 (see s. 2(b) and Gazette 15 Jan 2013 p. 79)
<i>Wills Amendment (International Wills) Act 2012</i>	47 of 2012	29 Nov 2012	s. 1 and 2: 29 Nov 2012 (see s. 2(1)(a)); Act other than s. 1 and 2: 11 Mar 2015 (see s. 2(1)(b) and Gazette 10 Mar 2015 p. 845)
<b>Reprint 5: The Wills Act 1970 as at 10 Jul 2015</b> (includes amendments listed above)			

## **Wills Act 1970**

**Notes**            Other notes

---

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>Legal Profession Uniform Law Application Act 2022</i> s. 424	9 of 2022	14 Apr 2022	1 Jul 2022 (see s. 2(c) and SL 2022/113 cl. 2)

### **Other notes**

- <sup>1</sup>    The *Acts Amendment (Equality of Status) Act 2003* s. 211(2) reads as follows:
- (2)    The repeal effected by subsection (1) applies to and in respect of the will of any person dying on or after the date of the commencement of this section, whether the will was made or executed before, on or after that date but does not apply to the will of a person who died before that date.
- <sup>2</sup>    Part IX of the *Wills Act 1970* is affected by the *Administration Act 1903* s. 47A.
- <sup>3</sup>    Marginal notes in the *Wills Act 1970* referring to legislation of other jurisdictions have been omitted from this compilation.

## Defined terms

*[This is a list of terms defined and the provisions where they are defined.*

*The list is not part of the law.]*

<b>Defined term</b>	<b>Provision(s)</b>
apparent.....	10(1)
Convention.....	32A
country .....	4
Court .....	39(1), 49
dispose of.....	4
disposition.....	4
document.....	32(1)
Family Court of Australia .....	14A(1)
Family Law Act .....	14A(1)
internal law .....	4
international will .....	32A
marriage .....	4
person concerned .....	39(1), 40(1)
place.....	4
previous will .....	41(2)
Principal Registrar .....	39(1)
property.....	4
repeal.....	17(1)
statutory will .....	48(1)
this jurisdiction .....	32A
will .....	4, 41(2)